United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

74-2293

To be argued by
SHEILA GINSBERG

B
P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

JAMES G. MARTIN,

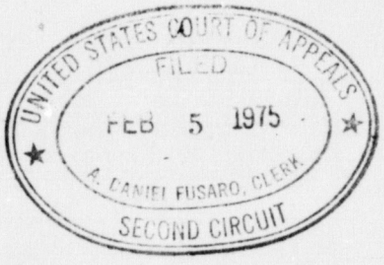
Appellant.

Docket No. 74-2293

Docket No. 74-2524

BRIEF FOR APPELLANT

ON CONSOLIDATED APPEALS FROM
AN ORDER AND JUDGMENT OF
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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STATEMENT PURSUANT TO RULE 28(3)

Preliminary Statement

These consolidated appeals are from an order of the United States District Court for the Southern District of New York (The Honorable Richard Owen) entered on September 30, 1974, holding appellant in criminal contempt, and from a judgment of the same court rendered on November 15, 1974, after jury trial, convicting appellant of two counts of tax evasion by the failure to report additional income in 1967 (count 1) and 1968 (count 2) in violation of 26 U.S.C. §7201. Appellant was sentenced to a one year and one day period of incarceration on each count of tax evasion to be served concurrently; he was sentenced to a six month period of incarceration for the contempt to run consecutively with the sentences imposed for the tax evasion.

The Legal Aid Society was continued as counsel on appeal pursuant to the Criminal Justice Act.

Statement of Facts

Appellant was charged* with two counts of income tax evasion in violation of 26 U.S.C. §7201, in that he failed

* The indictment is annexed as "B" to appellant's separate appendix.

to pay taxes on approximately $14,000 of taxable income in 1967 (count 1), and approximately $9,000 of taxable income in 1968 (count 2). The theory of the Government's case was that appellant had embezzled this money from his employer, that he squandered this money gambling at race tracks and that he never reported the increase to his income on his tax returns.

In defense, while appellant conceded that he did manipulate his employer's books and funds, he maintained throughout the proceedings that his purpose was to cover-up an already existing discrepancy for which he had no responsibility. Since he never personally benefited from any of these machinations, appellant asserted that he did not evade payment of his taxes by failing to report his true income.

The Trial

A. The Government's Case

The Government established that since 1952, appellant had been associated with St. Agatha's Home for Children and that he was, from sometime before 1964, the "Director of Finance" at that institution (27-45;45-65*). In this

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* Numerals in parenthesis are to pages in the trial transcript.

capacity, appellant was in charge of recording the flow of funds into and out of the Home, including payrolls and Federal tax deductions (28). According to Sister Mary Ward, administrator of the institution from 1964-68, although appellant's financial reports were occasionally late, as far as she was concerned, they were prepared properly (44).

Robert R. Cardany, Jr., (66-124)* and Stephan R. Novak (125-140) were accountants with the firm of Hauser, O'Connor and Hyland in 1968. Both testified to their unsuccessful attempt to audit St. Agatha's 1968 financial records. The accountants were unable to do a bank reconciliation. The audit could not be completed because there were missing bank statements and cancelled checks**(71). Cardany conceded, however, that other of St. Agatha's employees besides appellant had access to the books and records of the Home (102-5).

John R. Murphy, a Special Agent with the Internal Revenue Service, testified as to his investigation of appel-

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* Cardany succeeded appellant in the position of Director of Finance at St. Agatha's when appellant was terminated in June of 1969 (66).

** During the course of the search for the missing records, appellant was in the hospital. According to Cardany, he made one attempt to reach appellant at home (98). Novak did not try (139).

lant (140-169). According to Murphy his investigation revealed that during the years 1967 and 1968, in addition to the regular recorded payroll checks issued to appellant,* other checks, which were unrecorded on the books of the Home were made payable to appellant.** In addition, Murphy compiled a list of checks that were either unrecorded on the books of the Home or had appellant's name on the back of the check as a second endorsement.*** The Government theorized that appellant cashed all of these checks resulting in a total increase in his income of $14,603.15 in 1967, and $9,064.28 in 1968 (313).

The next Government witness was Milton Soloman, another Special Agent with the Internal Revenue Service, who testified about a 1971 interview he had with appellant (170). During the course of the questioning, appellant revealed that he had borrowed money from various finance companies in order to pay his gambling debts**** (173-4).

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* These checks tallied with what appellant reported on his 1967 and 1968 tax returns (147-149).

** These checks totaled $3,497.04 for 1967 and $5,150.36 in 1968 (150-151).

*** These checks were introduced into evidence as Exhibit 17-3--17-56 (152).

**** On redirect examination, the Government introduced over objection appellant's 1965 "1040" form which revealed that in that year, appellant set off his gambling losses against his winning (181).

Ethel Weiss, assistant to the finance director at St. Agatha's, testified as to the record-keeping procedures in the office (188-210). While she asserted that bank statements and cancelled checks were either received by mail or picked up by the appellant (191), she made clear that appellant never kept any area of responsibility exclusively to himself*(197). On cross-examination, Weiss revealed that she and appellant had discussed horse-racing and that she knew appellant did gamble but that she never heard him complain about losing (205-7). Weiss also revealed that appellant regularly cashed checks for other employees (210).

The Government next presented a series of twenty-five witnesses, the payees of the checks introduced in Government's Exhibit 17. The witnesses testified that they did not endorse the back of their respective checks, that they did not authorize anyone else to endorse the checks and that they did not receive the proceeds of the checks** (210-307, 358). During cross-examination, Henry R. Bauer (242), George Martin (272), Joseph F. Murphy, Sr. (293), John M.

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* For example, she asserted that she as well as appellant had authority to use the signature stamp to sign St. Agatha's check (191, 199, 202).

** Also presented was a stipulation as to the testimony of two other payee's to the same effect (307).

Sinnott(298), and Rudolphus A. Polk (301) each conceded that although they were friendly with appellant and talked regularly with him, he did not discuss gambling or horseracing with them.

Concluding its case, the Government elicited testimony from a handwriting expert that it was "very likely" that the first endorsement on all the checks in Exhibit 17 were made by appellant (374).

On cross-exaimination of Agent Murphy* he acknowledged that he did not investigate appellant's style of life to determine if he was living beyond his reported income ( ). Murphy also admitted that he did discover that the Nanuet National Bank had made substantial loans to St. Agatha's Home which were nowhere recorded on the books of the Home (33). He also learned that these loans were repaid with unrecorded checks ( ). Similarly, he found that unrecorded checks were used by St. Agatha's to pay the Internal Revenue Service, the pension plan, and the Mutual of New York (348). Although on direct examination Murphy sought to challenge appellant's prior statements that he

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* Murphy's testimony was broken up to aid the Government's presentation. He was cross-examined by the defense after his second time on the stand.

regularly cashed checks for other employees (353), he now conceded that he had only questioned twenty-five of the more than two-hundred employees at St. Agatha's (357).

B. The Defense Case

Murial Martin, appellant's wife of twenty-seven years testified about their style of living. They lived in the same home for twenty-four years - at 3929 Carpenter Avenue in a $94/month, four room apartment. The Martins have three children; one of their sons is a policeman; the other is an accountant; their twelve-year-old daughter is still in school (407). In 1967, appellant was driving a "Dodge" automobile which he was paying for on installments (410). The only vacations Mrs. Martin could remember that the family took were to Cape Cod and even then appellant joined them only on the week-ends. Although appellant did, according to his wife, go regularly to the racetrack, he never complained about losing a lot of money (412-3).

James Martin testified in his own behalf. He is sixty years old and a high school graduate; he completed one year at Fordham University and took one course in accounting at New York University (418). His duties at St. Agatha's included preparing the payroll, making deposits and doing the

acount's payable (423). Mr. Martin affirmed that he never embezzled any money (417), but he did admit participating in a "cover-up" explaining that one existed throughout his employment at St. Agatha's. According to appellant there were many irregularities in the books of the Home and he helped to conceal them (425). He conceded that because of the existence of these discrepancies he never, even before 1968, did a proper bank reconciliation (428-430). Appellant admitted that on occasion he took some of the books home to work on them, but he catagorically denied destroying them (430). He also admitted endorsing the checks in Exhibit 17* and he volunteered that he had done this same thing before 1967 (431). According to appellant, St. Agatha's was in arrears in its payments to the Federal Government on required employer contributions toward social security payments **(432). The cash gotten from these unlisted checks was used to pay the Federal Government as well as other outstanding bills (431). Again, appellant affirmed he

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* In this respect appellant's testimony was perfectly consistant with the prior statement's he had made to Agents Murphy and Solomom in which he admitted endorsing both the unrecorded payroll checks to himself, and those made payable to other employees (314-15). He also maintained throughout that he never took funds from the Home(164, 172-3), and further that any shortages in St. Agatha's accounts were due to the way the institution was run (166).

** Murphy had conceded that St. Agatha's was about $112,000 in arrears in these payments (333).

never took one penny of St. Agatha's money for himself; he testified that he had no bank accounts, and that he owned no stocks (438) and, although he went to the racetrack two or three times a week, he was not a big bettor (434).

When asked when he first discovered the problem in St. Agatha's books, appellant estimated that he learned of it some time in the 1950's (435). At that time he revealed this discovery to one person at the Home, but he declined to answer defense counsel's questions as to the identity of this person (436).

On cross-examination, appellant steadfastly maintained that he did not embezzle any funds and that the improprieties in which he had concededly participated were only to continue this cover-up.

C. The Contempt Proceeding

At this point in his cross-examination, the prosecutor asked appellant if when he discovered the discrepancy in the books, he informed anyone at the Home of the problem. Appellant responded:

> If I say, yes, it seems to be a Federal case.[*] I said it last week, and you know . . . I'm not going to name any names in this case.

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* Appellant's reference was to an earlier episode during which Judge Owen, out of the presence of the jury, directed the prosecutor to outline alternative courses of action open to the judge if appellant were to refuse to answer this question on cross-examination as he had during direct examination (440-443a).

When pressed further by the prosecutor, appellant conceded that he did bring the shortage to someone's attention; he further asserted that he revealed this problem to his priest during confession and that at one time he contemplated reporting the discrepancy to Mount St. Vincent* but subsequently lost the courage to do so (490). Nonetheless, when asked the identity of the person to whom he had first revealed his discovery, appellant despite an explicit direction from the Court, steadfastly refused to comply:

> THE COURT: Yes, Mr. Martin, you are directed to answer that question.
>
> THE WITNESS: Well, the answer is that I did bring it to somebody's attention, your Honor, and as far as naming names at this stage of the game if we stay heretill doomsday, I wouldn't name anybody.
>
> (491).

Out of the presence of the jury the prosecutor argued that since appellant had contended that certain other people were responsible for perpetuating this cover-up or for causing it** it was within the proper scope of cross-examination to learn who the person[s] were to permit impeachment by rebuttal (492). Accordingly, the

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* Apparently the location of the church office that supervises the Home.

** In fact, appellant had already explicitly disclaimed that he had said that he knew persons who were responsible for the discrepancy (459).

Government, relying on "Title 28"* and Shillitani v. United States, 384 U.S. 364, requested that the trial be continued and appellant be committed pursuant to a finding of civil contempt for a period of no longer than eighteen months or until he purged himself of the contempt (493-495).

Defense counsel argued that appellant's refusal to reveal names was a fact that of itself went to the credibility of his assertions of prior disclosure and that this was an appropriate matter for comment by the prosecutor in his summation (499).

After a brief recess, the Judge sua sponte announced his intention to find appellant guilty of criminal contempt. Appellant was then given an opportunity to confer with counsel who stated for the record that because the person[s] whom appellant refused to name was a nun, appellant, a practicing Catholic, believed that as a matter of conscience he could not, even under threat of contempt, reveal her identity (501). The Judge found appellant guilty of criminal contempt and sentenced him to six months in prison, holding specifically:

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* Presumably §1826.

> Mr. Martin, under such cases as Yeats against the United States, 355 United States 66 and under 18 United States Code 4013 I am compelled to find, sir, that you are in disobedience to a lawful order of this Court. I would prefer not to. However, as I said out in open court before, the matter on which you have declined to testify on cross-examination is highly relevant and probative to the defense that you have put into this case on direct examination, which is the main defense. I feel that you cannot be permitted to to put a defense into this case by your own direct testimony and then when cross-examined as to it to take a stance that prevents the Government from properly exploring the truth or falsity of the defense.
>
> As a consequence I am prepared to certify this conduct having been committed in my presence. I will summarily sentence you to six months imprisonment for refusal to answer after the Court has directed you to answer, and this sentence, however, is not to commence until the conclusion of this trial. At that time it shall commence. And judgment shall be prepared by the Clerk and submitted to me accordingly.
>
> 503

Defense counsel objected to the immediate imposition of the penalty and requested time to research the criminal contempt question. The Court reserved decision on the request but indicated a "negative reaction" to it (504). In conclusion, the Court restated that:

. . . In order that there be no question about it, this sentence is being imposed for Mr. Martin's failure after being directed by the Court to answer the specific question as to those told about this shortage when he first learned about it. What other person or persons he told having learned about this shortage, I assume the time frame being the early 50's, or in any event whenever it was learned of and Mr. Martin acknowledges he told someone, it is the failure to answer the question to name the person he told, having been directed to so answer that constitutes the criminal contempt.

D. The Trial Resumes

When the jury returned,* the prosecutor resumed his cross-examination:

Q Who did you work for when you first came? Who was your supervisor when you worked in the bookkeeping department?

MR. GREENBERG: Your Honor, I believe this line of questioning would relate to our previous conference.

THE COURT: Well, I would overrule the objection. You may ask it.

Q Do you recall the name of your supervisor when you first became associated with the bookkeeping department?

A No, I don't.

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* The Judge explicitly instructed the prosecutor that the contempt covered only this one question and that if he had any other questions as to the responsibility of others, the questions had to be put to appellant (506).

Q Pardon me?

A No, I don't.

Q You do not?

A No.

Q It is your testimony that these shortages existed when you first came into the bookkeeping department; is that correct?

A No.

Q They did not?

A I don't know when they -- you know, they existed in the latter part of the '50's when I first noticed them, that's what I have testified to.

Q Were you working for someone else in the bookkeeping department in the latter part of the '50's?

A I always had a boss when I worked there, except the last two or three years.

Q Prior to the last two or three years -- I assume you are saying the last two or three years before 1968; is that correct?

A I'm saying '68,'67,'66.

Q Prior to that time when you did have a boss who was that boss?

A It was three different nuns during the years that were in charge of that office. What years they were there I am not sure of.

Q Are you referring to the administrator of the Home or another nun who was under the administrator who worked in the bookkeeping department?

A Yes, another nun that was over me,yes.

Q When was the last time a nun had charge of the bookkeeping department?

A Somewheres in the '60's, Mr. Wilson.

Q Do you recall the name of that nun?

A Gee, it's only a guess. I think it was Anita.

Q Sister Anita?

A I believe so. The last one, I think. Here or Sister Theresa.

Q Was she or Sister Theresa aware of the shortages in the books?

A No.

Q They were not?

A No.

Q You did not tell them?

A No, I did not.

Q Who did you work for prior to Sister Anita or Sister Theresa?

A Back in that room again.

MR. GREENBERG: Your Honor, I believe that that is the question discussed prior.

MR. WILSON: The question was, who did you work for prior --

THE COURT: I will overrule it.

> Q Who did you work for prior to the time you worked for either Sister Anita or Sister Theresa?
>
> A You asked me that before and I thought I said I didn't remember.
>
> (510-512)

Shortly thereafter appellant volunteered, in the presence of the jury, that he had lied when he said he could not remember the name of his first superior in the accounting office and that, in fact, this person was the one he had previously refused to identify (514).*

E. The Prosecutor's Summation

At the outset of his summation, the prosecutor explained to the jury that because the Government had the burden of proof in the case, he was permitted to address the jury after defense counsel, so as to "even up the odds of the trial"(549). He went on to explain to the jury that:

> If we fail on any one element of either count, we lose. You must return a verdict of acquittal. However, if we have convinced you beyond a reasonable doubt of each and every element of these two counts then we have won, or justice has won.
> (550)

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* In rebuttal the Government introduced a death certificate for appellant's fourth child to contradict appellant's assertions as to when the child had died and the validity of using the child as a dependant for tax purposes in 1965.

Finally, addressing appellant's assertion that his actions were only to cover-up an already existing discrepancy in the books the prosecutor pointed out that St. Agatha's as a charitable institution, was expected to run at a deficit:

> The main thing is to feed and clothe the little kids, not to make money.
> (563)

F. The Charge and the Questions

In his charge to the jury* the Judge instructed them on the appellant's credibility as follows:

> Now the law permits but does not require the defendant to testify on his own behalf. Obviously a defendant has a deep personal interest as a result of his prosecution, indeed it is fair to say he has the greatest interest in its outcome.
>
> Interest creates a motive for false testimony and a defendant's interest in the result of his trial is of a character possessed by no other witness.
>
> In appraising his credibility, you may take that fact into consideration.
>
> However, I want to say this with equal force to you -- however, it by no means follows that simply because a person has a vital interest in the end result, that he is not capable of telling a truthful and straightforward story.
>
> (591)

The jury deliberated the remainder of that day.

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* The charge is annexed as "C" to appellant's separate appendix.

They returned the next day with two questions. The first was:

> What is the definition of taxable income?
> (601)

and the second was:

> As a matter of law, does the Government have to prove Mr. Martin made personal use of embezzlement proceeds to show unreported taxable income?
> (602)

The Court answered the first question as follows:

> . . . income after exemptions and deductions upon which the tax rate is applied. I call your attention to line 11-D of Government Exhibit 1 in evidence*, which is the line setting forth taxable income in that particular return, and I will return that Exhibit herewith to you which I borrowed from you.
> (610-11)

The Court's answer to the second question was that:

> The Government need only show unreported taxable income to Mr. Martin. The Government need not show how Mr. Martin spent it after it became his income, if you find that it did.
> (611)

Counsel objected prior to the delivery of the latter instruction stating it would destroy the defense (605).

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* A copy of Exhibit 1 is annexed as "D" to appellant's separate appendix.

After further deliberation, the jury convicted appellant on both couts (611a).

G. Post Verdict Proceedings

After the verdict, the Judge, addressing defense counsel's motion for an opportunity to research and present further argument to the Court on the question of criminal contempt, expressed the view that appellant had concocted a false and incredible defense and that his refusal to answer the question of the nun's identity was the climax of this strategy. As evidence of this evaluation of the defense case the Court cited to defense counsel's failure to make an opening statement to the jury, and his failure to stipulate to the testimony of the payees of the suspect checks and the testimony of the handwriting expert. From this the Court theorized that the appellant first put the Government to its proof to see if there was a deficiency and then when this approach failed, appellant conceded the operative facts and sought to explain them with an "astonishing story" (612-614).* Despite

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* The Judge expressed this view of the defense when he explicitly agreed with the prosecutor's argument that appellant's assertion of prior disclosure was a total fabrication (622). This reaffirmation of the belief that the refusal to answer the question was to insolate the perjury came even after the Judge had accepted defense counsel's assertions that the defense presented was the exact defense that appellant had maintained in all his pre-trial conferences with counsel, and was not a recent fabrication to meet the Government's case. Counsel revealed that the refusal to stipulate to the testimony of the various payees in this context was counsel's decision based on his intention to question these witnesses about appellant's gambling habits or reputation for gambling. Finally, as to the testimony of the handwriting expert, it was revealed that the Government had never requested a stipulation (610-617).

the fact that appellant's identification of all but one of his superiors enabled the Government to establish the requested identity, something the Judge himself acknowledged, the Judge adhered to his ruling that appellant's refusal to articulate the desired name was an obstruction of justice (615).

The Court also denied defense counsel's request (618-620) to remove the six-month sentence on the contempt and defer the sentencing until such time as the Court had an opportunity to see a pre-sentence report*:

> . . . frankly, I am more influenced by the jury's verdict here than I am by Mr. Martin's protestations, I decline to disturb my contempt sentence and to the extent that it is appropriate I restate it as of this time.
> (624-5)

H. Sentencing

At the time of sentencing on the tax evasion, defense counsel asked the Court to reconsider the contempt conviction (632-4). Reiterating his belief that the appellant had lied and his concern that the appellant by his refusal to answer had precluded effective cross-examination, the Judge refused to reduce the six-month contempt sentence (634-6).

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* Defense Counsel agreed that his motion for a hearing would be satisfied by deferring the sentence until the pre-sentence report was available (620).

ARGUMENT

Point I

THE TESTIMONY GIVEN BY APPELLANT IN SUBSTANCE COMPLIED WITH THE DISTRICT COURT'S ORDER. SINCE HIS CONDUCT DID NOT RESULT IN AN OBSTRUCTION OF JUSTICE, IT WILL NOT SUPPORT THE CONVICTION AND SIX-MONTH SENTENCE FOR CRIMINAL CONTEMPT.

The conduct resulting in the contempt was appellant's refusal to reveal the name of the person to whom he first reported the discrepancy in St. Agatha's books. Judge Owen believed that this assertion of prior disclosure substantially improved the credibility of the defense and that appellant's refusal to answer the question improperly insulated that assertion from cross-examination (623-624). The Judge specifically set forth his reasons for the contempt conviction as follows:

> ... In order that there be no question about it this sentence is being imposed for Mr. Martin's failure after being directed by the Court to answer the specific question as to those told about this shortage when he first learned about it. What other people or persons he told having learned about this shortage, I assume the time frame being the early 50's or, in any event whenever it was learned of and Mr. Martin acknowledges he told someone, it is the failure to answer the question to name the person he told, having been directed to so answer that constitutes criminal contempt.
>
> (506-507).

In Judge Owen's view, appellant's refusal to answer

this one question was an obstruction of justice mandating immediate punishment by way of criminal contempt.* The judge reaffirmed his finding of contempt at the time he sentenced appellant on the substantive crime,** stating that a defendant could not interfere with effective prosecution by testifying and then refusing to be cross-examined.

This was error. Whatever may be the validity of the judge's position as a general principle of law, it simply does not apply to the facts of this case. Although appellant did not literally articulate the name of the person to whom he had initially revealed the discrepancy in St. Agatha's books, the substance of appellant's testimony, as Judge Owen himself recognized, enabled the prosecutor to determine the denied identity if he was genuinely interested in doing so. In his

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*In so concluding, the Judge did not give proper consideration to first holding appellant in civil contempt as a means of securing compliance. Shillitani v. United States, 384 U.S. 264, 271 n.9 (1966); Yates v. United States, 355 U.S. 66, 75 (1957). The Judge rejected this alternative out of hand, on the theory that appellant should be present during the trial and therefore could not be civilly committed (495). What Judge Owen failed to consider was that appellant could have been present during the day at trial and committed at night, a procedure apparently followed in Yates, supra.

**Appellant has, of course, not yet begun to serve the contempt sentence, this Court having, on October 8, 1974, granted bail pending appeal. In light of this Court's ruling, Judge Owen continued appellant on bail pending appeal on the tax evasion conviction (642).

testimony appellant did reveal that before he assumed control of the bookkeeping department at the home, he had three successive superiors to whom he reported in that department; when asked wh they were, he named two of them, but declined to name the third. At first, he asserted that he didn't remember her name, but then volunteered in the presence of the jury that the assertion was a lie and that he didn't name this particular superior because she was the one he had earlier refused to implicate.

This information was all the prosecutor needed to secure rebuttal testimony if the Government had desired to do so. The employment records of the home would establish the name of this superior,* which was the only information appellant had withheld. Therefore, inasmuch as the finding of contempt rests on §401(3) for refusal to comply with an order of the court to answer a particular question, the conviction must be reversed. Appellant's refusal to utter the requested name cannot fairly be viewed as a violation of the court's order when appellant's testimony virtually revealed the superior's identity. While appellant could not bring himself, as a matter of personal conscience of a practicing Catholic, actually to name a nun in a criminal proceeding, he chose, instead, to provide sufficient information to enable easy discovery of the necessary evidence.

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*Appellant had further facilitated discovery of the name of the superior by indicating that he had made his revelation to his superior in the late 1950's.

In substance, and by his own design, appellant did comply with the Court's direction to reveal the "critical" identity.*

For the same reasons, the Judge's finding of obstruction of justice** in appellant's refusal to articulate that particular name, must also fall. It is now well established that the use of the contempt power must be limited to an actual, not merely a potential, obstruction of justice. In re Little, 404 U.S. 553 (1972); In re McConnell, 370 U.S. 230 (1962). This is so because the contempt power, exercised as it is without the constitutional safeguards of indictment and jury trial, permits a great potential for abuse. Aware of the dangers, both Congress and the courts have sought to limit the scope of

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*If, despite the accepted principle that the criminal contempt power is an extraordinary and drastic remedy applied to limited situations, this Court believes it was appropriate here, the circumstances do not justify the six-month sentence imposed. Thus, this Court's power to review the severity of a sentence for a contempt conviction should be exercised. In re Williams, Doc. No. 73-2697, slip op. 1277, 1297 (2d Cir., January 10, 1975); see also Yates v. United States, supra, 355 U.S. at 76. Nothing in appellant's conduct or his record justified imposition of the maximum sentence. Moreover, over objection by defense counsel, Judge Owen imposed sentence without allowing counsel sufficient time to marshall facts in mitigation of the penalty. United States v. Wilson, 488 F.2d 1231, 1234 (2d Cir. 1973), cert. granted, 42 U.S.L.W. 3631 (May 13, 1974) (appeal pending); United States v. Marra, 482 F.2d 1196 (2d Cir. 1973). That the District Court allegedly "reconsidered" this sentence at the time sentence was imposed for the tax evasion conviction does not compensate for the initial uninformed imposition of a final sentence. United States v. Manuella, 478 F.2d 440 (2d Cir. 1973).

**Although the Judge initially characterized appellant's conduct as violative of 18 U.S.C. §401(3) in that appellant refused to comply with an order of the court, the Judge's subsequent explanation for the conviction was to characterize it in terms of obstruction of justice, in violation of §401(1).

the power.* While the purpose of contempt is to protect the administration of justice (Ex Parte Terry, 128 U.S. 289 (1888)), to allow its application in situations where the threat is either remote or hypothetical is to permit and encourage too great an intrusion upon the procedural protections afforded by the Bill of Rights. In re McConnell, supra, 370 U.S. at 324.

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*In 1831, the abuses of a federal district court judge named James Peck led to the termination of the broad authority granted by §17 of the Judiciary Act of 1789 to "... punish by fine or imprisonment, at the discretion of said court, all contempt of authority in any case or hearing before the same...." 1 Stat. 83. To replace §17, Congress passed the Act of 1831, which drastically limited the power to punish for criminal contempt. In only three instances was it possible: misbehavior in the presence of the court, misbehavior of court officials in their official transactions, and disobedience of or resistance to the lawful writ, process or order of the court. 4 Stat. 487. Frankfurter and Landis, POWER OF CONGRESS OVER PROCEDURE IN CRIMINAL CONTEMPTS IN INFERIOR FEDERAL COURTS, 37 Harv.L.Rev. 1010, 1023-1030 (1924).

This concern for abuse of the power also found expression in judicial decisions which drastically curtailed the substantive scope of the power. Anderson v. Dunn, 6 Wheat. 204, 231 (1821); In re Michael, 326 U.S. 224, 227 (1945) ("least possible power to [achieve] the end proposed"]; In re Bradley, 318 U.S. 50 (1943); Ex Parte Robinson, 19 Wall. 505, 512 (1873) (limiting the type of punishment to be imposed); Nye v. United States, 313 U.S. 33, 48 (1941); In re Michael, supra, 326 U.S. 224 (limiting the offenses to which the statute applied); Cammer v. United States, 350 U.S. 399 (1956) (restricting the category of persons to whom it extended).

In light of the total absence of factual support for the finding of obstruction of justice, the Judge's repeated characterizations of the defense as "concocted"* reveal that the contempt conviction must have been influenced by the Judge's belief that appellant had lied. This was error. Perjury, a separate crime (18 U.S.C. §§1621, 1623) subject to indictment and jury trial, is not sufficient to support a finding of criminal contempt. In re Michael, 326 U.S. 224 (1945); In re Oliver, 333 U.S. 247 (1948); Ex Parte Hudgings, 249 U.S. 378 (1919).

There is no basis for applying the extraordinary sanction of criminal contempt in this case, and the judgment must be reversed.

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*The Judge referred to appellant's version of the facts as an "astonishing story." He agreed with the prosecutor that the defense was a fabrication. Moreover, he refused to reconsider the sentence, stating: "... frankly, I am more influenced by the jury's verdict here than I am by Mr. Martin's protestations ..." (624-625).

Point II

REVERSAL OF THE CONVICTION FOR TAX EVASION IS REQUIRED BECAUSE THE SUPPLEMENTAL INSTRUCTION IN RESPONSE TO THE JURY'S SPECIFIC QUESTIONS, RELIEVED THE GOVERNMENT OF PROVING AN ELEMENT OF THE CRIME, AND WAS DESTRUCTIVE OF THE DEFENSE PRESENTED.

Appellant's defense to the charge of tax evasion was that, contrary to the Government's contention, his income was not increased by cashing unrecorded checks drawn on St. Agatha's account. Appellant explained that the only reason he cashed these unrecorded checks introduced by the Government was to pay some of St. Agatha's outstanding debts. Some of these debts were not reflected in the books, and others were shown to have been previously paid when, in fact, they were not. The defects in the books had begun before appellant's employment, and he merely continued the process.

In addition to the fact that appellant's modest life style indicates that he was not benefitting from any embezzlement scheme, the cross-examination of John Murphy, an Internal Revenue Service agent, and the Government's key witness, supported appellant's explanation of the need to obtain funds to pay St. Agatha's debts. Murphy conceded that his investigation revealed that St. Agatha's home was indeed the recipient of substantial loans which were not recorded on the books of the institution. Moreover he revealed that the home was in arrears in its payments to the Federal government on required employer

contributions toward social security payments. Significantly, Murphy admitted that the loans and debts to various agencies, such as the Internal Revenue Service and Mutual of New York, were paid by the home in unrecorded checks.

If the jury credited appellant's explanation of what he did with the proceeds of the unrecorded checks, it had to render a judgment of acquittal. On appellant's theory, there would be no support for the theory that appellant had converted the funds. Thus, there would be no additional income from which to adduce tax liability.

While the defense was clearly presented by counsel, and restated by the Judge in his initial charge to the jury (582), the Judge's supplemental instructions,* given in answer to two critical questions asked by the jury, subverted and virtually destroyed the defense. The two questions, submitted together to the District Court on the second day of deliberations, were as follows:

> 1. What is the definition of taxable income?
>
> (601).
>
> 2. As a matter of law, does the Government have to prove Mr. Martin made personal use of embezzlement proceeds to show unreported taxable income?
>
> (602). Emphasis added.

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*Defense counsel strenuously and repeatedly objected to the supplemental charge.

The apparent import of these questions, taken together, is that the jury was asking whether appellant would be liable for the taxes on the funds even if he used them exclusively to pay St. Agatha's debts.* The answers given, over defense counsel's objection, not only failed to address the jury's quandary, but also were actively misleading. As to the definition of taxable income, the Judge said:

> ... income after exemption and deductions upon which the tax rate is applied. I call your attention to line 11-D of Government Exhibit 1 in evidence, which is the line setting forth taxable income in that particular return, and I will return that Exhibit herewith to you which I borrowed from you.
>
> (610-611).**

The instruction gave no answer to the question. Nowhere is there a definition of taxable income. Nowhere did the Judge explain what elements were necessary to render funds physically in the hands of the taxpayer his income for purposes of tax liability. If appellant had the funds for purposes of using them for St. Agatha's, it was not his income.

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*The Government agreed with this understanding of the questions, but argued incorrectly that even if appellant had used the funds for the home, he was still guilty of tax evasion (604, 606). Under New York law, however, if appellant had intended to use St. Agatha's funds for St. Agatha's benefit, he was not guilty of embezzlement. N.Y. Penal Law, §155.05(1) and (2a).

**Line 11-D in Exhibit 1 ("D" to appellant's separate appendix) refers back to lines 11-b and 11-c, which in turn refer back to lines 11-a and 9, then to lines 8 and 7, to lines 5 and 6, etc.

The answer given to the second question did not ameliorate this deficiency; rather, it compounded it. As though the jurors' second question had been merely "Does the Government have to prove what Mr. Martin did with the money?", the Judge responded:

> The Covernment need only show unreported taxable income to Mr. Martin. The Government need not show how Mr. Martin spent it after it became his income, if you find that it did.
>
> (611).

The answer is not appropriate to the question in the context of this case. What the jurors wanted to know was not how appellant spent the money after it became his income, but whether it became his income at all. Thus, in framing his answer, the Judge skipped a step in the necessary chain of proof. Instead of telling the jurors what constituted personal income, he assumed that fact, and told the jurors only that the way the income was spent need not be proved. Since the manner in which the money was used is evidence of whether it was to be treated as personal income, the District Court, in essence, relieved the Government of the responsibility of proving an essential element of the crime charged, and the conviction must be reversed.

POINT III

THE JUDGE'S CHARGE ON APPELLANT'S CREDIBILITY MANDATES REVERSAL BECAUSE IT VIRTUALLY INSTRUCTED THE JURY THAT THERE WAS A PRESUMPTION THAT APPELLANT WAS LYING

Appellant and his wife were the only witnesses who testified for the defense. The acceptance or rejection of appellant's credibility was critical to the outcome of the case. Appellant alone provided the singular exculpatory explanation for his admitted manipulation of St. Agatha's records: he set out how he used the funds from the unrecorded checks solely to pay debts of the Home that were also unrecorded. While his explanation was supported by Agent Murphy's concessions that such debts existed, it was nonetheless appellant's testimony that was pivotal to the viability of the defense. If the testimony was accepted enough to create a reasonable doubt in the minds of the jurors as to the validity of the Government's theory, there could be no conviction. See United States v. Booz, 451 F.2d 719 (3d Cir.1971), cert. denied, 414 U.S. 820 (1973); United States v. Houston, 434 F.2d 613 (5th Cir.1970); United States v. Marcus, 166 F.2d 497, 504 (3d Cir. 1948).

Toward that end, appellant had the right to have the jury fairly evaluate his credibility. 18 U.S.C. §3481. This was precluded by the Judge's charge. After a separate instruction on general witness credibility, the Judge directed assessing appellant's credibility as follows:

> Now the law permits but does not require the defendant to testify on his own behalf. Obviously a defendant has a deep personal interest as a result of his prosecution, indeed it is fair to say he has the greatest interest in its outcome.
>
> Interest creates a motive for false testimony and a defendant's interest in the result of his trial is of a character possessed by no other witness.
>
> In appraising his credibility, you may take that fact into consideration.
>
> However, I want to say this with equal force to you -- however, it by no means follows that simply because a person has a vital interest in the end result, that he is not capable of telling a truthful and straightforward story.
>
> (591)

This was error. The instruction virtually sets up a presumption that appellant was lying.* While this Court has approved instructions that remind a jury of a de-

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* In light of the action taken on the charge of contempt and the Judge's twice stated belief after verdict that appellant had lied, that he told an "astonishing" and "fabricated" story, this is no doubt what the charge was intended to do.

fendant's "vital interest" in the outcome of the case,* it has also noted that such a charge can be unfair. United States v. Mahler, 363 F.2d 673 (2d Cir. 1966). In this case it was more than unfair. Not only was the instruction on appellant's credibility, separate from the general charge on witness credibility, there was no similar instruction given on the interest that Government witnesses can have in the outcome of the case. Moreover, [United States v. Sullivan, 329 F.2d 755 (2d Cir. 1964)], this instruction went beyond the boundaries of the "special interest" charge. It articulated that appellant's interest in the case would insprie him to lie -- a hypothesis that is true only if he were guilty. Moreover, the Judge went on to compound the error. Rather than cautioning the jury that the appellant's interest did not mean that he would lie, he told them instead that the vital interest did not mean that appellant was not capable of telling a truthful story. The clear implication of these words is that there was a presumption that appellant was lying unless the jury choose to find that he was not.

The charge requires that the conviction be reversed.

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* Other circuits have criticized even this instruction [United States v. Hill, 470 F.2d 361 (D.C.Cir. 1972); United States v. Saletto, 452 F.2d 193(7th Cir. 1971); Taylor v. United States, 390 F.2d 278(8th Cir.1968)] and recommended instead the charge set forth in Devitt and Blackmar, Federal Jury Instructions §12.11:

> A defendant who wishes to testify, however, is a competant witness and the defendant's testimony is to be judged in the same ways as that of any other witness."

Point IV

THE PROSECUTOR'S INFLAMMATORY AND PREJUDICIAL REMARKS IN SUMMATION DEPRIVED APPELLANT OF A FAIR TRIAL.

The Assistant United States Attorney has a particular obligation, as representative of the Government, to act fairly and objectively and to confine his arguments to the issues before the court. Berger v. United States, 295 U.S. 78 (1893); United States v. Burgos, 304 F.2d 177 (2d Cir. 1962). That standard was violated in this case. The only issue presented to the jury for determination was whether appellant had increased his income by funds embezzled from his employer. The identity of his employer was irrelevant to the case. Nonetheless, the prosecutor clearly prejudiced appellant in the eyes of the jurors when he referred to St. Agatha's Home as unconcerned about functioning at a deficit because "[t]he main thing is to feed and clothe the little kids, not to make money." The effect of this reference to "little kids" most certainly communicated to the jury that appellant was a bad man because he was willing to steal from little orphaned children. In United States v. Burgos, supra, this Court severely sanctioned similar misconduct and reversed the conviction.

Similarly, seeking to incur the jury's sympathy for the Government, the prosecutor sought to paint the United States as underdog in this contest with appellant. Consequently, the

prosecutor sought to explain his right to sum up last as an attempt to "even up the odds."

Finally, the prosecutor told the jury that if the Government failed to carry its burden of proof, the Government would lose, whereas if it met its burden, the Government would win, and "justice has won." Clearly, the existence of justice is not dependent upon the Government's victory in a given prosecution. Justice is also done when the jury acquits because the Government has failed in its burden of proof. To inform the jury that justice will be done only upon conviction is improperly to intimate that the prosecutor has knowledge of a defendant's guilt. Berger v. United States, supra. It also inspires the jury to convict regardless of the evidence.

The prosecutor's gratuitous and prejudicial comments in this case, unprovoked by defense counsel and unjustified by anything in the record, must not be condoned.

CONCLUSION

For the above-stated reasons, the conviction for criminal contempt should be reversed and the charge dismissed; alternatively, the six-month sentence should be reduced. The conviction for tax evasion should be reversed and the case remanded for a new trial.

Respectfully submitted,

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Certificate of Service

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I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.

Sylvia Greenberg